JUL 5 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19—

No. 203

MRS. CLIFFORD RAYMOND SCHLICHTER,
Petitioner,

versus

PORT ARTHUR TOWING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUBJECT INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING WRITS	7
ARGUMENT	8
CONCLUSION	16
PROOF OF SERVICE	17
APPENDIX "A"	19

Cases Cited:

Butler v. Whiteman, 356 U. S. 271 (1958)	15
Kirincich v. Standard Dredging Co., 112 Fed. (2d) 163 (1940)	11
Rogers v. Missouri Pacific Railroad Co., 77 Sup. Ct. 443	8
Sadler v. Pennsylvania Railroad Co., 159 Fed. (2d) 784	12

Cases Cited—(Continued)

	Page
Schlichter v. Port Arthur Towing Co., 288 Fed. (2d) 801	1
Schulz v. Pennsylvania RR. Co., 350 U. S. 523 (1956)	15
Sentilles v. Inter-Caribbean Shipping Corp., 361 U. S. 107 (1959)	15
Stankiewicz v. United Fruit Company, 229 Fed. (2d) 580 (1956)	10
Varveris v. U. S. Lines (C. A. N. Y., 1957), 249 Fed. (2d) 89 (1957)	9

Statutes:

Constitution of the United States, Amendment 7	2
46 U. S. Code 688, "The Jones Act"	2, 8
46 U. S. Code 526(e)	2, 7, 11

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PORT ARTHUR TOWING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. Clifford Raymond Schlichter, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW.

No opinion of the District Court in *Schlichter v. Port Arthur Towing Company* was written; the opinion of the Fifth Circuit Court of Appeals in this case (Appendix "A," *infra*, pages 19-31) is reported at 288 Fed. (2d) 801.

JURISDICTION.

The opinion of the Fifth Circuit Court of Appeals in *Schlichter v. Port Arthur Towing Company*, No. 18,505, was entered on April 5, 1961 (Appendix "A," *infra*, page 19). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED.

(1) When there are issues of fact upon which reasonable men could find a seaman's employer negligent or the vessel unseaworthy, can the trial court direct a verdict for the defendant?

(2) Can a trial court, by ignoring the evidence or reasonable inferences therefrom, deprive a litigant of a jury trial under the Jones Act?

(3) Can the trial court exclude admissible evidence upon which a jury could find negligence or unseaworthiness or could reasonably infer a condition of negligence or unseaworthiness, and then grant a directed verdict based upon the supposed failure to make a jury case?

STATUTES INVOLVED.

(1) Constitution of the United States, Amendment 7.

(2) 46 U. S. Code 688, "The Jones Act."

(3) 46 U. S. Code 526(e).

STATEMENT.

Petitioner in this case is the widow of Clifford Raymond Schlichter, and it is his death that gives rise

to this cause of action. The deceased was employed by the respondent as a tugboat engineer on the ANN LEE, and had been so employed for a period of years. On the night of Februray 23, 1960, Schlichter was drowned. At the time the tug was moored to the dock of a chemical company in the Ouachita River at Sterlington, Louisiana. The tug had been there several days. After mooring the tug at the dock, the captain and the remainder of the crew went to their homes for a periodic shore leave. Schlichter desired to remain aboard, and this was permitted. Schlichter's home was not close to Sterlington, and that was the reason that he elected to remain aboard the vessel. On the day in question, a Sunday, Schlichter had been aboard the tug, and was visited by two former employees of the company, Alfred Redden and Russel H. Slade. Some of the evidence indicates that there was some drinking aboard the vessel prior to the three of them leaving the vessel and going ashore, where there was some additional drinking. When the three of them returned to the vessel on that same night, it was dark. There were no lights burning on the tug. In order to get to the vessel, it was necessary that the decedent and his compa..ions go from the terminal wooden catwalk, running out from the shore, down onto the tug. They had to climb down a vertical ladder some 15 or so feet in height. The men boarded the tug near the bow, and made their way back to the stern by the passageway on the starboard side. At that time it apparently became Schlichter's purpose to relieve himself while standing on the after deck near the starboard side. No survivors saw Schlichter fall. How he fell, or what caused him to fall, is not known. Slade, the only survivor, had his back to Schlichter and heard the splash. Approximately

four or five seconds after Schlichter fell, Redden jumped into the water, presumably to try to save Schlichter. Slade looked frantically around the stern of the tug for life rings or life jackets, or some other life-saving apparatus to throw to the men in the water. He saw Redden's head come up one time, and in a pitiful attempt to do something to save the drowning man, he threw the only available thing which he felt might float, and that happened to be a washtub. He then, in his further search for some appropriate life-saving gear, tried to kick in the galley door but, finding it was locked, was required to run the entire length of the vessel on the main deck to the bow, where he was required to climb a vertical ladder to the second deck, upon which the wheelhouse was located. The wheelhouse was not locked, and he obtained two life jackets. He then ran back to the stern of the vessel on the second deck and, seeing Redden come to the surface again, he heaved the life jackets to him at that time. Redden was not able to grasp one. Both men drowned.

It appears that, at the inquest following the accident, Slade, the only survivor, had testified that Schlichter was not drunk. It also appears that Schlichter had no difficulty in negotiating the difficult terrain in order to board the vessel. The testimony of Slade, who apparently had been very close to the employer and to his supervisory employees, even to the extent of accepting favors from them, was, at the very least, lacking somewhat in credibility. It was obvious at the trial that he was trying to favor the employer. At the trial he changed his testimony and testified that Schlichter was drunk.

The respondent claimed that there was a company rule against drinking aboard the vessels. However, when the petitioner attempted to show that this rule was honored mainly in the breach, the district court excluded the evidence.

The evidence also shows that the life rail, or stanchion, extending around the vessel, was normally waist high; however, at the point where Schlichter was standing, just prior to his fall, it was only knee high. Petitioner claims that this constituted more of a hazard than a safety feature, and could have been a proximate cause of Schlichter's fall.

In addition, the petitioner claims the unavailability of life-saving apparatus was a proximate cause of Schlichter's drowning. The employer attempted to explain this violation of the legal duty to have available life-saving gear by claiming that in order to avoid pilferage it was necessary to lock this life-saving gear up while the vessel was unattended. There was no effort on the part of the employer to explain why the life-saving gear would have to be locked up and a washtub would be left unattached on deck. There is also no evidence, as the appellate court seemed to imply, that there was a real problem of loss of valuable ship equipment from pilferage. The owner of the respondent company made some vague claims about theft, but there was certainly nothing to substantiate the value of life rings as being substantial, and, as the average juror would be well aware, the cost of a good life ring, located on the stern of this vessel, would not exceed $10.00. The employer claims on one hand that Schlichter was the one who

locked the galley door, where there supposedly was available life jackets, and that this relieves them of any liability towards Schlichter for the life jackets not being available. In the same breath, the employer acknowledges that it was a company custom to keep these doors locked, presumably in order to reduce the alleged, but unproven, pilferage. In addition, there is no evidence whatever that Schlichter removed any life-saving gear from a readily accessible position on the bulkheads or deck of this vessel, and locked same before leaving it. The body of Schlichter, upon autopsy, showed 0.31% alcohol in the blood. A pathologist, produced by the defendant, gave opinion testimony that Schlichter was drunk at the time of his death, based upon some accepted alcoholic content theory. Of course, the jury was completely free to disregard this opinion testimony, particularly in view of the fact that Slade had actually testified at the Coroner's Inquest that Schlichter was not drunk, this being factual proof. At the conclusion of the evidence, the district court rendered a directed verdict in favor of the defendant. Petitioner took the position that a directed verdict should not be rendered because:

(1) Reasonable men could have determined that the failure to have readily accessible life-saving gear was negligence, which proximately caused or contributed to the death of Clifford Raymond Schlichter.

(2) Reasonable men could have determined that the failure to have the normal waist-high life rails or stanchions around the stern of the vessel, where persons are more likely to fall overboard than elsewhere on the

vessel, was an unseaworthy condition which caused or contributed to the death of Clifford Raymond Schlichter.

(3) It is within the ambit of jury determination to infer, from the fact that a companion jumped overboard to save Schlichter's life, that Schlichter could have come to the surface, at which time readily accessible life-saving gear would have saved Schlichter's life.

(4) It is within the province of the jury to conclude that the only living eyewitness, who obviously had been catered to and befriended by the tug owner, was not telling the whole truth, particularly when it was shown that he altered his testimony, and that the facts regarding the matter could have been altered to favor the defense.

(5) The jury could have determined that the tug owner did not comply with the Coast Guard Regulation, 46 U. S. C. 526(e), regarding readily accessible life-saving gear, and that this statutory failure was a proximate cause of Clifford Raymond Schlichter's death.

REASONS FOR GRANTING WRITS.

(1) The United States Fifth Circuit Court of Appeals has rendered an opinion, affirming a district court action which materially erodes the right of a jury trial in Jones Act cases.

(2) The United States Court of Appeals for the Fifth Circuit has attempted, in affirming the actions of the district court, to strangle the right to a jury trial in Jones Act cases.

(3) This Honorable Court is called upon to reinstate this oft-assaulted right which is so vital to the proper protection of seamen and their dependents, and which this Court has so frequently and so emphatically and so unequivocably and consistently affirmed.

(4) To allow one such holding to stand upon which the shipowners may anchor their cases will open the gates for repeated abuse of this cherished legal right.

ARGUMENT.

I.

Jury Trial a Matter of Right.

First we wish to point out that the Jones Act, 46 U. S. C. A. 688, specifically grants an injured seaman the right of trial by jury.

> "Any seaman who shall suffer personal injury in the course of his employment may at his election maintain an action for damages at law with the right of trial by jury."

II.

The Slightest Negligence Is Sufficient.

In the case of *Rogers v. Missouri Pacific Railroad Company*, 77 Sup. Ct. 443, a case which the Court of Appeals cites in its opinion, the Court said:

> "The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest in producing the injury or death for which damages are sought. It does not matter

that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including employees contributory negligence."

See also:

Varveris v. U. S. Lines (C. A., N. Y., 1957), 249 Fed. (2d) 89 (1957).

The Court attempts to distinguish the *Rogers* case and thereby not apply its test by saying that the test requires evidence, and there was no evidence in the case at bar. Let us examine the record and review the evidence.

The Court stated in its opinion:

"There was nothing which would cause Schlichter to lose his balance, slip or fall. A slight criticism was made on the height of the chain guard." (Appendix "A," page 7.)

It is our contention that a knee-high chain guard is not a guard at all, but an obstacle which can very easily cause a man to lose his balance and fall overboard. Whether or not such chain guard might have caused or contributed to the accident is, in our opinion, a jury question. The slight criticism referred to by the Court was to show that twelve jurors might very well find that this chain did cause or contribute to the accident.

Under the test in the above-quoted *Rogers* case, a slight criticism alone, if valid, would seem to satisfy

the test. The Court emphasizes throughout its opinion that Schlichter was the cause of his own death. We submit that the fact that Schlichter's negligence played a part in the cause of his accident does not bar his recovery from his employer, in addition to the fact that it was a jury question as to his negligence. Such negligence would have to be the sole cause to constitute a bar.

III.

Even Complete Intoxication Is No Bar to a Jury Trial.

Defendant counsel doted on the fact that the plaintiff had been drinking, and inferred that his alleged drunken condition was the sole cause of the accident. Assuming this to be true, the defendant is still not free from liability. The Court in *Stankiewicz v. United Fruit Company*, 229 Fed. (2d) 580 (1956), a case involving an injury due to the drunken condition of a crew member, stated:

> "Evidence that the ship's officers had failed to exercise ordinary care in protecting the safety of the crew, and were lax in enforcing the liquor rule was sufficient for the jury on the ground that such negligence was the proximate cause of plaintiff's injury."

It is pertinent to point out that the district court, after allowing the defendant to brand the deceased as a violator of their no liquor rule, refused to allow petitioner to show that the high-placed employees of the company (Port Engineer) actually had a practice of violating the no liquor rule and had brought liquor aboard the vessels for the other employees to drink.

A realistic appraisal of the record, however, will clearly show that the petitioner's condition, relaxed, tight, or dead drunk, was not the sole cause of his death.

IV.

The Appropriateness of Life Rings as Compared to Life Jackets Is a Jury Question.

Whether the ANN LEE had a sufficient number of life jackets aboard is not an issue. The issues are: first, were these life jackets sufficient to satisfy the defendant's duty to furnish a vessel equipped with proper life-saving gear; secondly, were these jackets placed aboard the ANN LEE as to be readily accessible within the provision of 46 U. S. C. 526(e). As to the first question, the appellate court states in its opinion:

> "In some situations either notions of ordinary prudence implicit in the concept of due care, or the exacting standards of seaworthiness, call for an owner to supply more than the bare facility exacted by statutory or regulatory law."

It is our contention that whether this is a situation that calls for more than said bare facility is a question for the jury. For the Court to usurp the jury function is to say that not one of twelve reasonable men could reasonably find that a life ring would have been more beneficial in this situation than a life jacket. On the question of comparative effectiveness of life-saving apparatus, the Court in *Kirincich v. Standard Dredging Co.*, 112 Fed. (2d) 163 (1940), said:

> "Where it appeared that a deck hand fell overboard from a barge that deck hands threw

heaving lines one inch in diameter in his direction that one line came within two feet of the spot where he was struggling in the water but that life preservers were not used the owner of the barge was liable for the death of the deck hand. 46 U. S. C. A. Sec. 490."

V.

The Failure to Have Accessible Life-Saving Gear, for Whatever Reason, Presents a Jury Question.

The second question, the placing of the life-saving apparatus, cries even more loudly for a jury's determination. Clifford Raymond Schlichter had specific orders to lock the doors on the ANN LEE. Respondent relied heavily on the argument that life rings were not customary on boats under 65 feet, and that on such boats no life-saving gear would be located on deck for ready accessibility. The trial court readily gave credence to this argument. The respondent states that the problem of loss of equipment from pilferage required that life-saving equipment be removed from the decks and stored within the superstructure. Let us suppose for argument that the doors were unlocked, would the life jackets then have been readily accessible within the terms of the Coast Guard Regulations? It seems to petitioner that they would not. For the Court to decide otherwise through use of the directed verdict makes a sham of the jury system. The Court in *Sadler v. Pennsylvania Railroad Co.*, 159 Fed. (2d) 784, makes this position amply clear.

"In an action for wrongful death of a cook who was found at night in water between car floats amidships and was drowned before he could

be rescued, where only life saving equipment on car floats was in crews quarters on the main bridge twenty to thirty feet above the decks of the car floats, negligence in failing to have such equipment available on decks was a question for the jury; Jones Act, 46 U. S. C. A. 688.

"The duty of a vessel to provide life saving equipment is not performed unless the equipment is so placed on the vessel as to be ready for instant use when needed. 46 U. S. C. A. 688, Jones Act."

VI.

The Jury Could Legally Have Inferred That Available Life-Saving Equipment Would Have Saved Schlichter.

Perhaps the most unjust determination made by the Court in this case involves the finding that no type of life-saving apparatus could have saved Schlichter's life; that Schlichter never came to the surface. This determination was based on the testimony of Slade, who admittedly left the fantail of the boat, tried to kick in a door and being unsuccessful, ran to the wheelhouse, obtained the life jackets, and returned to the fantail. Mr. Slade testified that he did not see Schlichter resurface, but readily admitted that Schlichter could have done so in his absence. It is possible and reasonable that Schlichter could have surfaced once or even more than once while Slade was on his mission of mercy. The Court found that this was not possible and in so finding glazed

over the fact that Redden jumped into the water ostensibly to save someone. It seems reasonable that he did so to save someone he saw in distress. The Court also ignored the fact that while Slade would not admit seeing Schlichter come to the surface, he actually saw Redden come to the surface twice; and it may very well be that Redden had located Schlichter in the water and a life jacket thrown to him would have enabled him to save Schlichter's life. The Court's last effort to rationalize its approach was based on the testimony of Dr. Rudolph J. Meuling, Jr., which the Court interpreted to the effect that Schlichter's alleged "substantial if not advanced state of inebriation" impaired his capacity for self help. Dr. Meuling, however, also testified when asked what effect cold water would have on a man whose reflexes are impaired (page 137 of the Record), "Some people with sudden shocks will regain for a short period of time some of their impairment." The Court apparently ignored this testimony, and refused to allow the jury to determine whether or not Schlichter was one of these people.

Did the chain cause Schlichter to fall; did Schlichter cause his own death; did employer's lack of enforcement of liquor rules play a part in the accident; would life rings have saved Schlichter's life; were the life jackets readily accessible; did Schlichter come to the surface after falling into the water; did the cold water revive Schlichter temporarily? It would be presumptuous for us to attempt to answer these questions. It was

equally presumptuous for the Court to answer them. These are questions which surely twelve reasonable fair-minded men could differ upon determining. For this reason one man, a judge or otherwise, is not qualified to usurp the function of the twelve members of the jury by making the determination himself. The case at bar bears a striking resemblance to *Butler v. Whiteman*, 356 U. S. 271 (1958); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107 (1959); and *Schulz v. Pennsylvania RR*, 350 U. S. 523 (1956). In all of these cases the United States Supreme Court jealously protected the seaman's right to jury trial by reversing erring trial courts and courts of appeal. It is also interesting to note that the same judge granted the directed verdict in *Butler v. Whiteman*, as did so in the case at bar, and that two of the three cases cited above were Fifth Circuit cases. In conclusion, it is with confidence that petitioner requests that such unreasonable action, so flagrantly perpetrated by the same judge in the same district court in *Butler v. Whiteman*, will again be struck down by the United States Supreme Court in *Schlichter v. Port Arthur Towing Company*.

The facts in the case of *Butler v. Whiteman*, *supra*, are strikingly parallel to the facts in the instant case. The Fifth Circuit, in rubber stamping the district court's directed verdict, ignored the ordinary and accepted rules of evidence because in order to affirm the decision it was necessary to ignore these principles. For instance, in referring to the testimony of the owner under cross-examination, the Fifth Circuit took the position that his testimony as an expert is controlling in this case. In the first place, they ignore the fact that the testimony of a

party on cross-examination binds only the party. In the second place, the Fifth Circuit said, "True, the jury because of his interest and the nature of expert testimony need not have credited it. But once discounted, nothing remains to supplant it." (Appendix "A," pages 25-26.) Here the Court is patently ignoring the fact that the jury can draw upon their own knowledge to supplant the testimony of any expert, or indeed, any witness.

The Fifth Circuit also takes the position that it is necessary to prove that availability of ring life buoys in contrast to life jackets was reasonably necessary. Petitioner submits that whether life jackets or ring buoys be on deck in cases of emergency is purely and simply a question for the jury. No evidence need be adduced to show such a requirement.

In the final analysis, however, even the Fifth Circuit acknowledges that there was a violation of the Coast Guard Regulations, "The life jackets were not, as the regulation literally requires, readily available at the scene." (Appendix "A," page 27.) The Fifth Circuit appears to charge the deceased with this violation on the grounds that he had the keys. In the first place, they patently ignored that there is no evidence that Schlichter took any available life-saving apparatus and locked them up. In the second place, they patently ignored that Schlichter was under orders to lock the doors.

CONCLUSION.

Petitioner submits that this is a case that cries for a jury determination, and the judgment of the Fifth Circuit Court of Appeals should be reversed and this

case remanded to the United States District Court for the Eastern District of Louisiana for a new trial.

Respectfully submitted,

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PROOF OF SERVICE.

I, DONALD V. ORGAN, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari on Messrs. Phelps, Dunbar, Marks, Claverie & Sims, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to their office at the Hibernia Bank Building, New Orleans, Louisiana.

Dated this . day of ....., 1961.

DONALD V. ORGAN

APPENDIX "A"

In the

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18505

MRS. CLIFFORD RAYMOND SCHLICHTER,
Appellant,

versus

PORT ARTHUR TOWING COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 5, 1961.)

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge.

BROWN, Circuit Judge: This appeal presents the question whether the District Court was correct in granting an instructed verdict in favor of a defendant vessel owner in a Jones Act, 46 USCA §688, claim for damages due to the negligent death of a seaman. We affirm.

The vessel is the small river pusher type towboat ANN LEE. She is 55 feet in length. Her stern is square

with a wooden grating type decking over the extreme after end. This raised portion is about a foot above the level of the steel deck. This gives the appearance of a platform four or five feet in length fore and aft and running athwart the stern. The steel deck is flat and furnishes a passageway across the stern immediately forward of this raised platform. It also furnishes a passageway approximately three feet wide along the port and starboard side of the deckhouse. The freeboard was in the neighborhood of two feet. Along each side of the tug are permanent steel stanchion posts to which a chain guard rail, about waist high, is fastened. From the after-most stanchion the chain guard rail leads downward to the grating at the after end. The chain guard in this area is about knee-high.

In the housing on the main deck were crew's quarters, engine space, and the galley-mess room. Access to these spaces was through conventional doors on each side. The galley door (on each side) was but four or five feet from the after end of the deck housing and not over 15 feet from the stern. The wheelhouse is on the next deck above. A ladder leads up to the wheelhouse deck. This ladder is immediately forward of the forward end of the deck house.

The drowning took place late on the night of February 23, 1960. Schlichter, the decedent, was a member of the crew serving as engineer. The tug was then moored to the dock of a chemical company in the Ouachita River at Sterlington, Louisiana. The tug had been there several days. After mooring the tug at the dock, the captain and the remainder of the crew went to their homes for a

periodic shore leave. Schlichter desired to remain aboard and this was permitted. Although the evidence does not categorically spell it out, Schlichter as the sole person aboard had a responsibility for the safekeeping of the vessel, or at least her removable equipment. Consequently, he had keys to all of the access doors. While there was a port engineer stationed at nearby Sterlington, the uncontradicted evidence showed that his responsibility was only as an engine maintenance man. It was not his duty to see that during Schlichter's stay lights were left on, doorways left open, or lifesaving gear kept available. These things were left entirely up to Schlichter.

On the afternoon of February 23, Schlichter had entertained two of his friends, Redden and Slade, aboard the tug. Each had worked for the Towing Company in the past but neither was then in its employ. Whether their presence or activity that afternoon was or was not permissible need not concern us since nothing then done caused harm. Likewise it does not matter how much drinking went on aboard the ship. For after he had all of the doors opening into the deckhouse locked, Schlichter and his two friends left the tug about 6:00 p.m. and went ashore where Slade and Schlichter engaged in some rather concentrated drinking. For example, Slade, the sole surviving witness and produced by the plaintiff, acknowledged that Schlichter had purchased 18 bottles of beer and the three of them had obtained two pints and one-fifth of Vodka. One pint was completely consumed, largely by Slade and Schlichter. The fifth was opened for one drink. How much beer each consumed was not directly shown, but it was substantial as several irrefutable factors made manifest. Slade's categorical acknowledgment on the witness stand

that Schlichter was intoxicated may be disregarded in view of his prior inconsistent statement given at the Coroner's inquest. But in stating the facts on which he based his opinion of intoxication, and whether, as one sign, Schlichter's speech was blurred or fuzzy, his answer showed both the extent of the drinking and his lack of dependable observation or recollection as a witness. It also appeared that when he stated to the Coroner that Schlichter was not drunk, he was using that term as he understood it and on that standard the man was not drunk so long as he was able to move as Schlichter clearly was. But intoxication was not left to the imponderables based upon the observation and estimates of witnesses using elusive terms which are unavoidably so inexact. The body was removed from the river the next day and an autopsy was performed for the Parish Coroner. It is uncontradicted that the chemical examination revealed the presence of 0.31% Ethyl alcohol in the blood. After all possible adjustments were made for changes due to post-death metabolism (the effect of which is to reduce alcohol in the blood) or possible production of body alcohol (which could account for a maximum of 0.05%), the reading was not less than 0.30%. A pathologist and toxicologist, whose qualifications were conceded, as an expert witness then compared this with medical studies made concerning intoxication of an average person. Whereas Schlichter had a 0.30% plus reading, it is considered, medically and legally, that a person with a reading in excess of 0.15% is too far under the influence of alcohol to permit driving an automobile. This figure is generally accepted as proof of driving while intoxicated. In the other direction, a reading of 0.40% produces a coma colloquially described as passing out. After that, an additional 0.10% is critical as death from

acute alcoholism generally occurs at 0.50%. The intensity of the state of intoxication is reflected by the amount of alcohol required to produce this percentage. The reading of 0.31% would have required 15 ounces of Vodka (at 80 proof) or 22 bottles of beer.

A more detailed description of the occurrence at the time of the drowning has not been prefaced by this review as a basis for any conclusion that, as a matter of law, death was due either partly or wholly to the seaman's intoxication. Intoxication does not work a forfeiture since that generally merely mitigates damages. *Bently v. Albatross S.S. Co.*, 3 Cir., 1953, 203 F. (2d) 270, 272, 1953 AMC 645; *McDonough v. Buckeye S.S. Co.*, N. D. Ohio, 1951, 103 F. Supp. 473, 1951 AMC 2042, affirmed 200 F. (2d) 558, 1953 AMC 343. Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries. *Donovan v. Esso Shipping Co.*, 3 Cir., 1958, 259 F. (2d) 65, 1958 AMC 2096. But this was a fact against which, in the peculiar circumstances of this record, the shipowner's duty and whether any breaches of such duty contributed to cause death is to be measured.

The three—Schlitcher, Redden and Slade, came back late that night. It was, of course, dark. No lights were burning on the tug but the lights from the terminal were presumably adequate in their judgment to permit them to go aboard. To go from the terminal wooden catwalk running out from the shore down onto the tug, they had to climb down a nearly vertical ladder some 15 or so feet in height. The men boarded the tug near the bow and made their way back to the stern by the passageway on

the starboard side. While the tug was equipped with adequate toilet facilities, these were located in the deckhouse which had been locked by Schlichter when he went ashore earlier that evening. Consequently it was Schlichter's purpose to relieve himself while standing on the after deck near the starboard side. No survivor saw Schlichter fall. How he fell or what caused him to fall is not known. Slade, the only survivor, had his back to Schlichter and heard the splash. Slade thereafter never saw Schlichter. Almost instantaneously Redden jumped in the water presumably to try to rescue Schlichter. Slade did see Redden's head come to the surface one time. In order to obtain a life jacket to throw toward Redden, he attempted to get in the galley, but the door was locked. He then ran forward and up to the wheelhouse which was still open, obtained a life jacket and ran back to the stern. After returning to the stern, he never saw Redden, Schlichter, or any sign of them. It was not until sometime the next day that Schlichter's body was recovered from the river.

This was no unexplained disappearance under circumstances suggesting unsafe working conditions as in *Schulz v. Pennsylvania R. Co.*, 1956, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668, 1956 AMC 737. Here Schlichter's position on the stern was reasonably fixed. The conditions then existing were known and on the trial were described without any equivocation. Slade affirmed categorically that the deck was free from grease or any other slippery substance. There was nothing which would cause Schlichter to lose his balance, slip or fall. A slight criticism is made of the height of the chain guard because at that point it ran down at an angle from waist-high to knee-high. But there was no evidence that the operation

of the towboat in its ordinary activities would reasonably have permitted any other type of railing or guard. Whether the lights on the tug were on is not clear. It was uncontradicted, however, that at the corner of the after end of the deckhouse there was a flood-type light which would have lighted up the entire after end. If that light was not on, it was because Schlichter had not turned it on. *Smith v. Reinauer Oil Transport, Inc.*, 1 Cir., 1958, 256 F. (2d) 646, 650, 1958 AMC 1875.

Liability cannot, therefore, rest upon the initial cause of Schlichter's falling into the water. If liability exists, it turns upon the inadequacy or unavailability of facilities for rescue.

In this record this comes down to the sufficiency of the lifesaving gear on board and whether, if sufficient in itself, it was readily accessible in the event of emergency. Here again the facts are in very little, if any, dispute. Aboard the towboat were not less than a dozen life jackets. But there were no ring life buoys. On behalf of Schlichter it was claimed that life rings ought to have been furnished and in any case the presence of life jackets aboard affords no legal justification since they were locked up and unavailable.

As to ring life buoys the plaintiff was content with whatever evidence could be obtained from the tug owner called as an adverse witness under F. R. Civ. P. 43(b). As a former ship master with unlimited governmental license for any tonnage and any waters, he certainly had the qualifications of an expert. True, the jury because of his interest and the nature of expert testimony need not have credited it. But once discounted, nothing remains

to supplant it. As a witness he stated that life rings are required and hence customarily found aboard ocean-going vessels and large tugs exceeding 65 feet in length. There were not, however, customarily found, nor were they required under Coast Guard regulations for vessels (not carrying passengers for hire) under 65 feet in length. In this respect he was borne out by the formal regulations promulgated by the Coast Guard which were introduced into evidence.[1]

Of course compliance with the customs and practices of an industry is not in itself due care. *Troupe v. Chicago, Duluth, & Georgian Bay Transit Co.*, 2 Cir., 1956, 234 F. (2d) 253, 260, 1956 AMC 1367; *Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc.*, S. D. N. Y., 1957, 152 F. Supp. 903, 918, 1957 AMC 1436; 38 Am. Jur. Negligence §34.

Similarly, governmental regulations do not necessarily measure the scope of duty. Occasionally they reflect merely a minimum so that noncompliance leads to imposition of civil responsibility almost as a matter of course. In some situations either notions of ordinary prudence implicit in the concept of due care or the exacting standards of seaworthiness call for an owner to supply more than the bare facility exacted by statutory or regulatory law. Prosser, The Law of Torts §34 at 163-64 (2 ed. 1955); The *T. J. Hooper*, 2 Cir., 1932, 60 F. (2d) 737, 1932 AMC 1175.

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[1] 46 CFR §25.25-10(b)(2). "Motorboats of Class 3 not carrying passengers for hire shall carry an approved life preserver or ring life buoy for each person on board."

Under 46 CFR §25.10-17 the ANN LEE came within the definition:

"Class 3—Any motorboat 40 feet or over and not more than 65 feet in length." Issued pursuant to 46 USCA §526p.

But that depends on circumstances and circumstances depend on evidence. There was no effort to disprove the custom and practice of vessels under 65 feet in length not to carry life rings. Nor was there any effort to prove by competent witnesses those facts from which a jury—untrained in the operation of vessels—could reasonably infer that availability of ring life buoys in contrast to life jackets was reasonably necessary.

In addition to this, as we shall later discuss, with the tug in the idle status and only one crew member living aboard her, there was a real problem of loss of valuable ship equipment from pilferage. The consideration that led to the locking of all of the access doors on Schlichter's departure with his friends that evening would have permitted like protection to ring life buoys.

That brings us to the availability of life jackets. The Coast Guard regulations for obvious reasons do not allow the shipowner to rest on the mere supply of life-saving gear. The gear must be readily available for use in emergencies that strike without much warning.[2]

Here the case takes on a new peculiarity that is inescapably tied directly to Schlichter. The life jackets were not, as the regulation literally requires, readily available at the scene. But why was that so? It was because the very person (or his successors) now complaining of lack of availability took the affirmative action which brought about this condition. The doors had been locked by Schlichter—or one of his cohorts at his direction. Schlich-

[2] The Coast Guard Regulations, see note 1, supra, provide:
46 CFR §25.25-15(a) "The life saving equipment on all vessels shall be so placed as to be readily accessible."

ter had the key. He was management's sole representative to determine when and what doors were to be locked. For what appears to have been good reasons—certainly plausible ones—he decided that all access doors on the main deck should be secured.

Unwittingly he may have sealed his own fate in that decision. Since he alone could make these decisions, and he alone took the decisive action, neither he nor those who claim through him can assert that the vessel owner had a duty to have someone there to supervise him in the performance of the limited task which fell to his lot as the sole occupant of the tug under the permissive arrangement allowed by the owner. *Smith v. Reinauer Oil Transport, Inc.*, 1 Cir., 1958, 256 F. (2d) 646, 651, 1958 AMC 1875.

This is not to make the owner's obligation to the one in charge any less exacting, or somehow to charge that person with the full, not pro rata consequences, of any mistaken judgment as may have been the case in *Walker v. Lykes Bros. Steamship Co.*, 2 Cir., 1952, 193 F. (2d) 772, 1952 AMC 269.[3] Here on uncontradicted facts there was an ample supply of life jackets. Located where they were, in the galley just a few feet from the scene with more of them stored in the crew's quarters a few feet

[3] This case and the so-called "primary duty rule" has been subject to considerable criticism, see Boat Dagny, Inc. v. Todd, 1 Cir., 1955, 224 F. (2d) 208, 1955 AMC 2083, which in turn rests largely upon the analysis made by this Court in Louisiana & Arkansas R. Co. v. Johnson, 5 Cir., 1954, 214 F. (2d) 290, and its application has been severely limited, Mason v. Lynch Bros. Co., 1956, 4 Cir., 228 F. (2d) 709, 1956 AMC 394; Spero v. Steamship Argodon, E. D. Va., 1957, 150 F. Supp. 1, 1957 AMC 1056. In its own circuit the **Walker** case has been expressly distinguished, Dixon v. United States, 2 Cir., 1955, 219 F. (2d) 210.

beyond, they would have been immediately—and hence readily—available had the doors not been locked. As to this claim Schlichter and those suing through him cannot say—in the absence of proof that he had positive orders overriding his freedom of judgment as to locking the doors—that it was the shipowner's negligence which resulted in these life jackets being unavailable.

In addition to these insuperable obstacles nowhere overcome by any evidence, there is a total lack of any evidence to show that under these unique conditions, availability of life jackets, or ring life buoys, in the galley messroom or elsewhere would have saved Schlichter's life. Of course the standard is now well known and has been variously stated. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific Ry. Co.*, 1957, 352 U. S. 500, 506, 77 S. Ct. 443, 1 L. Ed. (2d) 493.[4]

[4] It has received frequent application. Ferguson v. Moore-McCormick, 1957, 352 U. S. 521, 523, 77 S. Ct. 451, 1 L. Ed. 2d 511, 1957 AMC 647; Sentilles v. Inter-Caribbean Shipping Corp., 1959, 361 U. S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142, 1960 AMC 10; Kernan v. American Dredging Co., 1958, 355 U. S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382, 1958 AMC 251; Schulz v. Pennsylvania R. Co., 1956, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668, 1956 AMC 737; Davis v. Virginia Ry. Co., 1959, 361 U. S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366; Innman v. Baltimore & Ohio R. Co., 1959, 361 U. S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198; Conner v. J. Turner Butler, 1959, 361 U. S. 29, 80 S. Ct. 21, 4 L. Ed. 2d 10; Harris v. Pennsylvania R. Co., 1959, 361 U. S. 15, 80 S. Ct. 22, 4 L. Ed 2d 1; Moore v. Terminal R. Assn. of St. Louis, 1958, 358 U. S 31, 79 S. Ct. 2, 3 L. Ed. 2d 74; Ferguson v. St. Louis San Francisco R. Co., 1958, 356 U. S. 41, 78 S. Ct 671, 2 L. Ed. 2d 571; Stinson v. Atlantic Coast Line R. Co., 1957, 355 U. S. 62, 78 S. Ct. 136, 2 L. Ed. 2d 93; Gibson v Guy Thompson, 1957, 355

But to satisfy this there must be some evidence. Slade was standing within a few feet of Schlichter when the latter went into the water. Though his attention was immediately directed to the splash, Slade never saw Schlichter thereafter. Perhaps Redden did, in any event, Redden jumped in. Slade never heard either of them cry out. Where Schlichter was, or where he might have been seen, is not shown in any way. For a life preserver to be effective, there must be a person within its reach or at least thought to be within the specific area where the preserver is to be thrown. In this situation it would be sheer fantasy to say now that had one or two or three jackets or ring life buoys been available at the after end of the deckhouse, anyone would have been rescued. To this complete lack of any evidence there must be added the peculiar problem of this record. Whether there is a reasonable likelihood that Schlichter would have been saved cannot avoid taking into account the undisputed evidence about the substantial, if not advanced, state of his inebriation as it bore on his capacity for self help or survival.

In the complaint there was a second count based upon the Louisiana Death Statutes and the general maritime law for unseaworthiness. The former could not apply as to a seaman in view of the Jones Act. *Lindgren v. United States*, 1930, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686, 1930 AMC 399. Since every consideration discussed by us regarding any asserted negligence proximately causing or contributing to cause death would have

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U. S. 18, 78 S. Ct. 2, 2 L. Ed. 2d 1; Ringhiser v. Chesapeake & Ohio R. Co., 1957, 354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268, see annotation on sufficiency of evidence in FELA cases, 4 L. Ed. 2d 1787.

equal application to any assumed breach of the duty to furnish a seaworthy vessel under *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. (2d) 941, 1960 AMC 1503, we avoid, as did the Supreme Court, the necessity of determining whether there can now be any death action under that concept. *Kernan v. American Dredging Co.*, 1958, 355 U. S. 426, 429-30, 78 S. Ct. 394, 2 L. Ed. (2d) 382, 1958 AMC 251.

The unique circumstances of this record may be severely compressed. In every respect all that occurred rested directly on Schlichter. He was in the condition he was in voluntarily. It was because of his action in locking the doors that toilet facilities were closed. Cf. *Ringhiser v. Chesapeake & Ohio R. Co.*, 1957, 354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. (2d) 1268. He made the choice to go to the after deck instead of unlocking the door. If lights were inadequate, it was he who had the keys to permit them being turned on. Lifesaving gear was locked up and unavailable because he had locked the doors. Toilets, lights, lifesaving gear were all furnished. Nothing the owner did made them unusable or unavailable. The key to this was the key. The key was in Schlichter's pocket.

It follows that the Court was correct in directing the verdict.

AFFIRMED.

JUL 29 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 203

MRS. CLIFFORD RAYMOND SCHLICHTER,
Petitioner,

versus

PORT ARTHUR TOWING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PORT ARTHUR TOWING COMPANY, RESPONDENT IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
ARGUMENT	2
CONCLUSION	4

CITATIONS

Cases

Dowell, Inc. v. Jowers, 166 F. 2d 214 (5th Cir. 1948)	2, 3
The Harrisburg v. Rickards, 119 U.S. 199 (1886)	3
Landy v. United States, 101 F. Supp. 486 (E.D. Penn. 1951), aff'd 197 F. 2d 524 (3rd Cir. 1952)	3
Lindgren v. United States, 281 U.S. 38 (1930)	3
N.L.R.B. v. Quest-Shon Mack Brassiere Co., Inc., 185 F. 2d 285 (2nd Cir. 1950)	2, 3
New York Life Ins. Co. v. Bacalis, 94 F. 2d 200 (5th Cir. 1938)	2, 3
M/V Tungas v. Skovgaard, 358 U.S. 588 (1959)	3
Turcich v. Liberty Corp., 119 F. Supp. 7 (E.D. Penn. 1954) aff'd, 217 F. 2d 495 (3d Cir. 1954)	3
Western Fuel Co. v. Garcia, 257 U.S. 233 (1921)	3

Statute

Jones Act, 46 U.S.C. § 688	2

Other Authorities

III Wigmore, *Evidence* § 1018, p. 688	3

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May It Please The Court:

I.

OPINION BELOW

The opinion below is reported as set forth on pages 19 through 31 of the petition, and printed therein as Appendix "A", reported at 288 F. 2d 801 (5th Cir. 1961).

II.

JURISDICTION

Jurisdictional requisites are correctly set forth in the petition, but respondent submits there is no basis or need for granting a Writ of Certiorari herein.

III.

STATUTES INVOLVED

The only statute involved herein is the Jones Act, 46 U.S.C. § 688.

IV.

ARGUMENT

Petitioner asserts error on the part of the Court of Appeals for the Fifth Circuit in affirming the District Court's direction of a verdict in favor of respondent on the ground that there was insufficient evidence of negligence to raise an issue for the jury. The petitioner now calls upon this Honorable Court to review the evidence for the third time.

The facts are as stated in the well reasoned opinion of Judge Brown. The petitioner's "statement", exclusive of the polemics utilized therein, is, for the most part, supported by the record. However, there is no basis in the record for the following assertions of petitioner:

(1) " * * * The testimony of Slade, who apparently has been very close to the employer and to his supervisory employees, even to the extent of accepting favors from them, was, at the very least, lacking somewhat in credibility. It was obvious at the trial that he was trying to favor the employer. At the trial he changed his testimony and testified that Schlichter was drunk." [1]

[1] Petition, p. 4.

(2) " * * * in view of the fact that Slade had actually testified at the Coroner's Inquest that Schlichter was not drunk, this being factual proof. * * * "[2]

(3) " * * * (Slade) obviously (was) catered to and befriended by the tug owner, was not telling the whole truth, particularly when it was shown that he altered his testimony, and that the facts regarding the matter could have been altered to favor the defense."[3]

Although the law is clear that unseaworthiness alone is not a sufficient predicate for liability in a death case,[4] it is apparent from the facts developed, about which there is no dispute, that petitioner introduced no evidence to support a finding of negligence or unseaworthiness.

A review of the record and a study of the petition establishes that nothing less than rank conjecture could even vaguely support a finding that there was the slightest semblance of negligence on the part of respondent.

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[2] Petition, p. 6.

By no rule of evidence can prior contradictory statements of petitioner's own witness be treated as "factual proof." *Dowell, Inc. v. Jowers*, 166 F. 2d 214 (5th Cir. 1948); *N.L.R.B. v. Quest-Shon Mack Brassiere Co., Inc.*, 185 F. 2d 285 (2nd Cir. 1950); *New York Life Ins. Co. v. Bucalis*, 94 F. 2d 200 (5th Cir. 1938); III Wigmore, *Evidence* § 1018, p. 688 where it is stated:

> "It is universally maintained by the courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value*."

[3] Petition, p. 7.

[4] There is no cause of action for wrongful death under the General Maritime Law, regardless of whether the death is caused by negligence or unseaworthiness. *The Harrisburg v. Rickards*, 119 U.S. 199 (1886); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *M/V Tungas v. Skovgaard*, 358 U.S. 588 (1959). Petitioner is therefore strictly limited to the statutory remedy given to her. Since it is alleged that the decedent was a *seaman*, petitioner's statutory remedy is limited to the Jones Act. Under that act, the petitioner must show negligence in order to recover for wrongful death, and cannot rely on unseaworthiness under the General Maritime Law. *Turcich v. Liberty Corp.*, 119 F. Supp. 7 (E.D. Penn. 1954), *aff'd*, 217 F. 2d 495 (3rd Cir. 1954); *Landy v. United States*, 101 F. Supp. 486 (E.D. Penn. 1951), *aff'd* 197 F. 2d 524 (3rd Cir. 1952).

Since the petitioner's action is within the scope of the Jones Act, this Court will not be concerned with an application of the Louisiana Death Statute. See *Lindgren v. United States*, 281 U.S. 38 (1930).

In order for petitioner to come within the scope of the cases cited on page 15 of the petition, evidence, if it were available, could have been introduced to establish (1) the existence of skid marks; (2) that Slade heard Schlichter bump or rattle the chain guard; (3) that respondent caused the decedent's inebriation; (4) that any life saving equipment could have saved Schlichter; (5) that anything, negligent or otherwise, which respondent did, was a proximate cause of the accident, or that there was any other basis for reasonable men to believe that respondent was negligent. No such evidence was presented, and presumably it could not be. We submit that the absence of such evidence is no justification for the substitution of the speculation which petitioner suggests. True, a jury conceivably could have found that respondent was negligent merely because it owned a tugboat, or permitted an intoxicated person aboard, but no finding of negligence could "reasonably" have been made.

The Appellate Court's legal conclusions fairly and accurately summarize the applicable law.[5] If this were not a proper case for the Court's exercise of the direction of a verdict, the rule allowing the trial court so to do will be rendered ineffectual.

V.

CONCLUSION

In conclusion, respondent submits that this case was decided fairly and equitably on its own facts in the Courts below; that the decision of the Court of Appeals for the Fifth Circuit does not conflict with any decisions of any other Courts of Appeals or conflict with any decisions of this Court; that the Courts below have not decided any important question of federal law which

[5] Petition, Pp. 23-31.

should be settled by this Court and that, accordingly, there is no basis or need for granting a Writ of Certiorari.

Respectfully submitted,

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